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IN THE

Supreme Court of the United States

October Term, 1968

THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA,

Petitioner,

v.

STATE OF OKLAHOMA; COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA; CITIES SERVICE OIL CO.; CONTINENTAL OIL CO.; EASON OIL CO.; STEVE GOSE; JAKE L. HAMON; HUMBLE OIL AND REFINING CO.; JEFFREY SAND AND GRAVEL CO.; LONE STAR PRODUCTION CO.; MARATHON OIL CO.; MOBIL OIL CORPORATION; PAN AMERICAN PETROLEUM CORPORATION; SKELLY OIL CO.; SOUTHLAND ROYALTY CO.; STEPHENS PRODUCTION CO.; SUN OIL CO.; TENNECO OIL CO.; UNION OIL CO OF CALIFORNIA, and YAHOLA SAND AND GRAVEL CO., a Corporation,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

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No.

THE CHEROKEE NATION OR TRIBE
OF INDIANS IN OKLAHOMA,

Petitioner,

v.

STATE OF OKLAHOMA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, the Cherokee Nation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-captioned case on October 31, 1968.[1]

[1] The Court of Appeals had before it two cases. No. 9924 involved the claim of the Cherokee Nation and No. 9925 involved the claim of the Choctaws and Chickasaws. This petition deals only with the claim of the Cherokee Nation.

CITATIONS TO OPINION BELOW

The District Court did not write an opinion in the case and the opinion of the Court of Appeals for the Tenth Circuit (Appendix A, *infra*) is reported at 402 F.2d 739.

JURISDICTION

The judgment of the United States Court of Appeals For the Tenth Circuit was entered on October 31, 1968. Mr. Justice Byron S. White on January 9, 1969, issued an order extending the time to file a petition for writ of certiorari to and including March 5, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Did the United States Government in 1838 impliedly reserve in trust for a future state, title to the bed of the navigable portion of the Arkansas River, under the mandate of the so-called "equal footing" doctrine when, without reservation, fee simple title to the vast area containing the river was conveyed by patent executed pursuant to valid treaty between the United States and the Cherokee Nation, as one undivided tract, the perimeters of which were described by metes and bounds, and when, the treaties with the Cherokee Nation defining the property expressly prohibited the ceded property from being included within the territorial limits or jurisdiction of any state or territory?

2. Did the Court of Appeals for the Tenth Circuit misapply as well as misconstrue the decision in *United States v. Holt State Bank,* 270 U.S. 49, so as to create a conflict between its decision and the decision of the Court in the *Holt State Bank* case?

STATUTES AND TREATIES INVOLVED

The case requires an examination of three principal treaties with the Cherokee Nation.

1. The Cherokee Treaty at Washington, D.C. with the Western (Old Settler) Cherokees May 6, 1828 [7 Stat. 311], proclaimed May 28, 1828;

2. The Cherokee Treaty at Fort Gibson with the Western (Old Settler) Cherokees February 14, 1833 [7 Stat. 414], proclaimed April 12, 1834;

3. The Cherokee Treaty at New Echota, Georgia, with the Cherokee Nation December 29, 1835 [7 Stat. 478], proclaimed May 23, 1836;

4. Patent executed by President Martin Van Buren, December 31, 1838.

Excerpts of these treaties have been reproduced as Appendices B, C, D and E, *infra.*

STATEMENT OF THE CASE

In December 1966 the Cherokee Nation filed an action in the United States Court for the Eastern District of Oklahoma against the State of Oklahoma and the holders of various mineral leases for an accounting and injunction against the use of the land underlying the bed of the Arkansas River from the point of confluence of the Grand River (sometimes known as the Neosho River and the Neosho-Grand River) to the confluence of the Canadian River and the northerly half of the river bed from that point to the Oklahoma-Arkansas border. The Cherokee Nation asserted that the land in question had been ceded by the United States to the tribe pursuant to treaties and patent deed which granted in fee simple to the Cherokee Nation the entire area without exception or reservation. The State of Oklahoma counterclaimed to quiet title on

the ground that under the equal footing-implied trust doctrine the state received title to the land underlying the river upon its admission to the Union.[2]

The Choctaw and Chickasaw Nations intervened as plaintiffs in the action claiming title to a portion of the land in question on the basis of the Choctaw Treaty of Doak's Stand, October 18, 1820, [7 Stat. 210] and the Choctaw Treaty of Dancing Rabbit Creek, September 27, 1830, [7 Stat. 333, Art. II]. The Choctaws asserted that the United States ceded a portion of the bed to the tribe when it established the northern boundary of the Choctaw tribal lands.[3]

The District Court entered its order quieting title in the State of Oklahoma and dismissed the claims of both the Cherokees and Choctaws and Chickasaws. In the Court of Appeals, the United States Government entered its appearance as *amicus curiae* and took the position that the land in question belonged to the Indians.

On appeal the court affirmed the order of the District Court and rendered its decision asserting that the land in question passed to the State of Oklahoma upon its admission to the Union on the basis of the equal footing–implied trust doctrine.

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[2] In the district court all parties stipulated that the portion of the river in dispute is navigable in fact.

[3] On page 2 of their petition for certiorari filed January 20, 1969, the Choctaws and Chickasaws claim to own *all* of the bed of the navigable portion of the Arkansas River within the State of Oklahoma. This obviously is a mistake and an overstatement of the Choctaw and Chickasaw claim. At no time in the court below did the Choctaws and Chickasaws lay claim to the river bed above the confluence of the Canadian. The portion in dispute between the tribes is the common boundary between the Cherokees and the Choctaws and Chickasaws along the Arkansas River between Canadian River and Arkansas-Oklahoma boundary line. See Appendix A at A-3.

Before this continent was discovered and the country established, the Cherokee Nation owned large tracts of land in the southern part of the United States, east of the Mississippi River aggregating some 79,986,454 acres. As early as 1785 the United States initiated a series of treaties with the Cherokee Nation with the avowed purpose of "leading the Cherokees to a greater degree of civilization" and at the same time taking land for its expanding population. In these treaties the United States acknowledged the sovereignty and integrity of the Cherokee Nation, with complete dominion and control of the land and rivers within its territory. By these treaties the United States brought the Cherokee Nation under its protection. See, *e.g.*, Treaty of Hopewell (1785).

With the westward expansion of the white settlers, despite the federal government's treaties, Cherokee land was further encroached upon and taken away. The Cherokees had little or no recourse; either move, fight or be overrun. The courts could not or would not accept jurisdiction over the tribes to grant relief. Their "only appeal was to the tomahawk or the government." See *Cherokee Nation v. State of Georgia*, 30 U.S. [5 Pet.] 1, 18.

By solemn treaty, to avoid the growing friction generated by the white settlers, the government pursued an aggressive[4] policy of moving the Cherokee Nation westward across the Mississippi River into the new lands purchased from France in 1803 under the Louisiana Purchase [8 Stat. 200].

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4 "After the enactment of the Indian Removal bill in 1830 [4 Stat. 411] several thousand more were induced to remove under Government supervision to their new western home. But the greater part of the tribe, refusing to move voluntarily, were moved from their homes at the point of the bayonet, herded into concentration camps, and forced out of the country." The Five Civilized Tribes by Grant Foreman at p. 281.

In 1817 and 1819 a few members of the Cherokee Nation (afterwards known as the "Old Settler" Cherokee) were persuaded to move into Arkansas [7 Stat. 156, 195]. Then in 1828, "the present location in Arkansas being unfavorable to their present repose"; Congress wanted to move the Cherokee farther west, with the stated purpose of establishing:

> * * * *a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever–a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; * * *. [Emphasis in original.] App. B., *infra.*

The Old Settler Cherokees with this promise, moved further westward beyond Arkansas and Missouri [7 Stat. 311]. Article 2 of the treaty set out by metes and bounds the precise area which would form the permanent home and future domain of the Cherokee Nation. See App. B, *infra.* In 1833 the United States eliminated a conflict between the Creeks and Cherokees over the boundaries of this tribal land. By treaty [7 Stat. 414] the government corrected and fixed the respective boundaries in the subject area thus completing the isolation of these tribes.[5] Pursuant to the Treaty of New Echota December 29, 1835 [7 Stat. 478], the main body of the Cherokee Nation still remaining in Georgia was moved in 1838-1839 to the new lands west of Arkansas in order to

[5] Prior to 1893, the United States pursued a policy of transferring Indian tribes from areas inhabited by white settlers and isolating the tribes from the white man. Wherever possible the Indians were given land, separate and apart from the white man, where they could carry on their way of life undisturbed.

remove the last vestige of friction between the Cherokees and the settlements in Georgia. The purpose of these treaties with the Cherokee and the other civilized tribes was to induce them to leave their lands in the east and move across the Mississippi. A at A-5.

It was expressly stated in Article 5 of the Treaty of New Echota:

> The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the foregoing article *shall in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory*. (Emphasis added.) App. D at D-7.

The Treaty of New Echota in 1835 incorporated the granting provisions of the prior 1828 and 1833 treaties. App. D, Art. 2 at D-4.

As a practical matter after 1833 the Cherokee Nation was the treaty owner of over 7,000,000 acres[6] of land in what is now eastern Oklahoma over which it exercised complete use, dominion and control. This ownership was confirmed and manifested in the patent executed in 1838 pursuant to the Treaty of New Echota which conveyed fee simple title to the land so described. App. E. *infra.*

In 1902 the United States executed an agreement with the Cherokee Nation whereby tribal title to certain of its

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[6] See page 5, *supra.* The Cherokee Nation owned over 79,986,454 acres of land in the East before entering any treaties with the United States.

allottable[7] land was extinguished and individual grants of *allottable* land were made. Fee title to all the lands which were not so distributed remained vested in the Cherokee Nation under treaty and patent [32 Stat. 716, 727]. Thereafter in 1906, the then Territory of Oklahoma entered the Union pursuant to the Oklahoma Enabling Act [34 Stat. 267] upon the condition:

> That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said limits owned or held by any Indian or Indian tribes, * * *.

REASONS FOR GRANTING THE WRIT

1. In affirming the order of the District Court, the Tenth Circuit Court of Appeals erroneously applied the equal footing-implied trust doctrine. The lower Court said:

> In Pollard v. Hagan, 44 U.S. (3 How.) 212, 230, the Court held that the Constitution did not pass title of the beds of navigable waters to the United States but reserved title to the several states. Because new states enter the Union on an equal footing with all other states title to the underlying navigable waters passes to the new states. App. A at A-8.

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[7] Act of July 1, 1902, 32 Stat. 716, 727 (Ch. 1375).

"Sec. 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements."

The appellate court failed to grasp the meaning and purpose of the doctrine.[8] "From a practical standpoint the equal footing principle must be recognized and maintained. There is no place in our federal system for a second-class state." Id. at A-10. This Court in *Alabama v. Texas*, 347 U.S. 272, determined that the requirement that states be admitted to the Union on equal footing with the original states does not demand that the courts wipe out diversities in the economic aspects of the several states but merely calls for parity as respects political standing and sovereignty. Indeed, Mr. Justice Reed in his concurring opinion stated the equal footing concept "does not affect Congress' power to dispose of federal property." Id. at 275.

It is a well settled principle of law that title to land once vested, as it was here by the treaty of 1835 and the patent of 1838, cannot be divested by the equal footing doctrine. In *Brewer-Elliott Oil & Gas Company v. United States*, 260 U.S. 77, Mr. Chief Justice Taft speaking for the Court stated "there was nothing in the admission of Oklahoma into a constitutional equality of power with the other states which required or permitted the devesting of title [to land]." Id. at 88.

It has been early recognized that the equal footing-implied trust doctrine does not bear upon the right of the United States to transfer title to land it owns. Compare *Spooner v. McConnell*, Fed. Cas. No. 13,245, 1 McLean 337 (CC. Ohio 1835); See, e.g., *Coyle v. Smith*,

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[8] It is interesting to analyze the facts of the *Pollard* case. Both Georgia and Virginia ceded property to the United States to be held *in trust on the condition* that a new State of Alabama was to be formed. The United States while under such condition and *after* Alabama became a state attempted to grant the land which had been under the Mobile River, contrary to state grants.

221 U.S. 559. The Oklahoma Enabling Act and the Oklahoma Constitution recognized that the equal footing-implied trust doctrine did not affect the title to land granted to and still owned by the Indians at the time Oklahoma entered the Union. See Oklahoma Enabling Act [34 Stat. at 267] and Article I, Section 3, Oklahoma Constitution. Certainly the fact that Oklahoma did not receive title to the bed of the Arkansas River does not relegate the state to any second class status.

2. The Court of Appeals in support of its decision relies upon its interpretation of *United States v. Holt State Bank*, 270 U.S. 49. The court acknowledges "although Holt State Bank was not concerned with a situation, such as we have here, involving a conveyance by the United States to the Indians, that case and the one at the bar each relate to the question of whether the United States has disposed of land underlying navigable waters before statehood." App. A at A-9. The court in arriving at its decision misread and misapplied *Holt State Bank*, so that its opinion, here under review, is in conflict with this Court's opinion in that case.

The sovereignty over the land in question was acquired by the United States under the Louisiana Purchase Agreement with France [8 Stat. 200] and the United States later acquired aboriginal Indian title by treaty and purchase from the Osages. While it held the land, the United States had the absolute right to grant for appropriate purposes, titles or rights in the land under the navigable waters. *Shively v. Bowlby*, 152 U.S. 1; *Goodtitle v. Kibbee*, 50 U.S. [9 How.] 471. It cannot for a moment be doubted that the United States in granting this undivided tract to the Cherokee Nation, acted in accordance with the interest of the Indians and for a valid public purpose.

The touchstone of the lower court's opinion is its reading of the *Holt* case. In *Holt State Bank*, the Chippewas by a series of treaties ending in 1854, just prior to Minnesota becoming a state, ceded to the United States their *aboriginal Indian title* held by right of occupancy to certain of their lands, the fee title being in the United States. The Indians continued to dwell on certain reserved portions of the land encompassing Mud Lake.

In 1858, Minnesota became a state and sometime later Mud Lake, formerly within the Indian Reservation, was drained and the State issued deeds to the reclaimed land. In 1889 the Indians ceded their lands to the United States in trust to be sold and the proceeds were to be placed to their credit (act of June 14, 1889, 25 Stat. 642). The lands so ceded included the reclaimed lands formerly constituting the bed of Mud Lake. The United States then claimed title to the land on behalf of the Indians, asserting that the United States still had title by virtue of a reservation of title to lands held by the Indians. The United States it should be noted held fee title to all the land in question within the state of Minnesota including the land reserved for the Indians. This Court determined that the land under the navigable waters passed to the state in 1858 because (1) the lands "had not been previously disposed of by the United States" and (2) "there was nothing in this which even approaches a grant of rights in lands underlying navigable waters; *nor anything evincing a purpose to depart from* the established policy before stated, of treating such lands as held for the benefit of the future state." Id. at 55, 58, 59. [Emphasis added.]

The Court of Appeals in its opinion states that *Holt State Bank* requires a clear manifestation of intent. Contrary to the language of this Cour, "nor anything evincing a purpose", the court below asserts that in a grant from the sovereign nothing passes by implication. App. A at

A-15. The Court of Appeals by this decision demands an express manifestation of intent which is a far greater requirement than was established by this Court. The Court below fails to grasp the vital distinction between Indian right of occupancy with fee title in the United States, involved in the *Holt* case, and a grant by the United States of fee title to the Cherokee Nation, involved in this case. *United States v. Creek Nation,* 295 U.S. 106. This is the crux of the *Holt State Bank* decision.

The court in its decision sets aside the fundamental concepts upon which *Holt State Bank* was premised:

(a) There is a great difference between aboriginal Indian title held by occupancy and use and fee simple title acquired expressly by treaty and/or patent. Compare *United States v. Creek Nation,* 295 U.S. 103, with *Shoshone Tribe v. United States,* 299 U.S. 476. Further it is well settled that the government can pass fee simple title to Indian tribes. *Northwestern Band of Shoshone v. United States,* 324 U.S. 335. In 1838 pursuant to the Treaty of New Echota, the government by metes and bounds conveyed fee title to the land in question to the Cherokee Nation. In *Holt State Bank* the Chippewas held only aboriginal Indian title which they ceded piecemeal to the federal government. The federal government always had fee simple title which it could grant as it saw fit. The Court in *Holt State Bank* clearly recognized that the first test was to ascertain if the federal government had disposed of the fee simple title to the property. Id at 58. In this case the Cherokee received fee simple title, without reservation, a *right* to all the land so deeded. In the *Holt State Bank* case the Chippewas had nothing approaching a right to the land underlying Mud Lake. Under *Holt State Bank* this Court would have to find that the government had parted with fee title and granted it to the Cherokee Nation before Oklahoma entered the Union.

(b) In construing treaties and patent grants with the Indians the usual rules of construction do not apply. The Indians are under the protection of the Government and treaties are to be interpreted liberally in their favor. *Jones v. Meehan*, 175 U.S. 1; *Blue Jacket v. Johnson County*, 72 U.S. [5 Wall.] 737. In *Holt State Bank*, the Court asked for *anything* that would evince a public purpose to depart from the policy of treating lands as held for the benefit of future states.

(c) The intent of Congress is to be evinced by a reading of all the applicable treaties and a consideration of all the circumstances in the light most favorable to the Indians. See, e.g., *Winters v. United States*, 207 U.S. 564; see also *Menominee Tribe of Indians v. United States*, 391 U.S. 404, footnote 2.

Unlike the Supreme Court in *Holt State Bank* which examined all the circumstances, the Court of Appeals in this case focuses on one fact, App. A at A-11, when there are numerous compelling facts. A consideration of the treaties discloses the intent of Congress to establish the Cherokee Nation in new lands over which it could exercise the same use, dominion and control as it did in its former lands. The purpose of Congress is clearly stated in the Preamble to the Treaty of New Echota:

> Whereas the Cherokees are anxious to make some arrangements with the Government of the United States whereby the difficulties they have experienced by a residence within the settled parts of the United States under the jurisdiction and laws of the State Government may be terminated and adjusted; and with a view to reuniting their people in one body and securing a permanent home for themselves and their posterity in the country selected by their forefathers without the territorial limits of the State

> sovereignties, and where they can establish and enjoy a government of their choice and perpetuate such a state of society as may be most consonant with their *views, habits* and *condition:* and as may tend to their individual comfort and their advancement in civilization. App. D, *infra.* [Emphasis added.]

See, e. g., *Worcester v. The State of Georgia,* 31 U.S. [6 Pet.] 515, 556 in which Mr. Justice Marshall speaking for Court acknowledged the rights of the Cherokee Nation to exclude the white settlers from crossing their land or navigating on the Tennessee River. Id. at 556. In *Atlantic & Pacific Railroad v. Mingus,* 165 U.S. 413, 435, 436, this Court noted the unusual relationship between the Cherokee Nation and the United States, and the land held by the Cherokee Nation, "A reference to some of the treaties under which it is held by the Indians indicates that it stands in an entirely different relation to the United States from other territories, and that for most purposes it is to be considered *an independent country.*" (Emphasis added.)

In its former lands the Cherokees had complete use and control of the rivers for fishing and transportation. It has been held in fixing the intent of Congress the court should consider the former existence and way of life of the Indian tribe. *United States v. Stotts,* 49 F.2d 619 (D.C.W.D. Wash. 1930). Certainly Congress knew the Cherokees' need of the rivers for transportation and other uses. Nonetheless, the Court of Appeals finds no intent on the part of Congress to cede the Cherokee Nation the bed to the navigable river.[9] Further, in granting this vast

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[9] The Court of Appeals in its opinion asserts that the treaties deal only with "political rights" rather than "property rights." App. A, at A-11. This ignores the circumstances and the actual language of the treaties and patent which granted *property* to the Cherokee Nation.

undivided tract to the Cherokee Nation, intent was manifested not only in the treaties, but the government executed *its first patent* with an Indian tribe expressly setting forth the ceded land by metes and bounds, physical monuments, without exception or reservation. See App. E., *infra.*

The combination of treaty and patent language evinces the clear intent of Congress to convey title to all the land within the perimeter. It has been held and it is accepted practice in conveyancing that if the language in the description of boundaries is clear, that should control. *Lowndes v. Town of Huntington,* 153 U.S. 1. "It is also a rule of construction that when one section of a statute treats specially and solely, of a matter, that section prevails in reference to that matter over other sections in which only incidental reference is made thereto." *Griffith v. Carter,* 8 Kan. 565. See also *United States v. Elliott,* 131 F.2d 720 (10th Cir. 1942).

The lower court admits that the "patents issued to the Cherokees and to the Choctaws contained no exception or reservation relating to the beds of navigable streams. The lands granted were described by their exterior boundaries." App. A, at A-6. If this had been a private conveyance, unless there was a specific reservation of title, there could be no question that a strip of land in the center of a large conveyance of land was included in that conveyance. This is simply good sense, since such retained strip would be useless and the reservation purposeless. In the 1830's, when these grants were made, there was certainly no logical purpose nor intent in retaining such a strip.

It is difficult to believe that the federal government after entering these solemn treaties to provide the Cherokee Nation a *permanent home* and executing a precise

patent to a vast undivided tract, at the same time intended to and did reserve title to uncharted, and as yet unknown, navigable rivers, on the ground that the United States eventually intended to envoke "the equal footing doctrine" on behalf of a future state which it expressly stated it would not form. To admit such a fact would be to admit that the United States Government from the outset never intended to keep its word and that when the Cherokee Nation put itself under the protection of this government it waived any rights that it might have in the lands granted.

3. The case raises an important question with regard to the construction and interpretation of the treaties of 1828, 1833 and 1835, and the patent issued thereunder. The Court of Appeals by the use of language to be found in its opinion (App. A, at A-11) seems to say that because of implied "implications" and ghosts of things to come, it is proper to deprive the Cherokee of title to its tribal land. No court, including the court below, has the right to vitiate valid treaties between the United States and the Cherokee Nation and the patent issued thereunder granting fee simple title. To do so would substitute its will for the will of Congress.

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the petition for writ of certiorari be granted.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 9924 & 9925–SEPTEMBER TERM, 1968

THE CHEROKEE NATION or Tribe of Indians in Oklahoma, THE CHOCTAW NATION and THE CHICKASAW NATION,

Appellants,

v.

STATE OF OKLAHOMA; COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA; CITIES SERVICE OIL CO.; CONTINENTAL OIL CO.; EASON OIL CO.; STEVE GOSE; JAKE L. HAMON; HUMBLE OIL AND REFINING CO.; JEFFREY SAND AND GRAVEL CO.; LONE STAR PRODUCTION CO.; MARATHON OIL CO.; MOBIL OIL CORPORATION; PAN AMERICAN PETROLEUM CORPORATION; SKELLY OIL CO.; SOUTHLAND ROYALTY CO.; STEPHENS PRODUCTION CO.; SUN OIL CO.; TENNECO OIL CO.; UNION OIL CO. OF CALIFORNIA; and YAHOLA SAND AND GRAVEL CO., a Corporation,

Appellees.

Appeal from the United States District Court
for the Eastern District of Oklahoma

Earl Boyd Pierce for Appellant The Cherokee Nation. With him on the brief were Joseph Muskrat, Andrew C. Wilcoxen and Jesse L. Ballard.

Lon Kile for Appellants The Choctaw Nation and The Chickasaw Nation.

M. Darwin Kirk for the Appellees. With him on the brief were:

G. T. Blankenship, Attorney General, for the State of Oklahoma;

N. A. Gibson for Commissioners of the Land Office of the State of Oklahoma;

Jay R. Bond and Ross, Holtzendorff & Bond for Eason Oil Company;

Varley H. Taylor for Humble Oil & Refining Co.;

Robert W. Richards and S. M. Groom, Jr., for Mobil Oil Corporation;

Judson S. Woodruff, McAfee, Dudley, Taft, Cates & Mark and S. W. Wells for Skelly Oil Company;

H. B. Watson, Jr., and Walker & Watson for Union Oil Company of California and Steve Gose;

Frederic Dorwart and Holliman, Langholz & Runnels for Lone Star Producing Co.;

David O. Cordell, Eugene A. Hoefling, Riley B. Fell and Oscar L. Hasty for Marathon Oil Company;

Glenn R. Davis, Boesche, McDermott & Eskridge and Millard F. Carr for Tenneco Oil Company;

Dale Hinson, Robert L. Trimble and Hudson, Keltner, Smith & Cunningham for Southland Royalty Company;

W. Douglas Weisbruch for Lone Star Producing Co.

Roger P. Marquis for Amicus Curiae the United States. With him on the brief were Clyde O. Martz, Assistant

Attorney General, and Frank B. Friedman, Attorney, Department of Justice.

Alpheus Varner for Amici Curiae Robert G. Carter, B. E. Cobb and Katherine Cobb Baker.

Before LEWIS, BREITENSTEIN and HICKEY, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This controversy concerns the ownership of the bed of the Arkansas River between its confluence with the Grand River[1] and the Oklahoma-Arkansas boundary. The Cherokees, Choctaws, and Chickasaws claim under deeds for vast areas executed by the United States. Oklahoma says that under the equal footing-implied trust doctrine it received title to the beds of navigable streams upon its admission to the Union. The trial court's decision in favor of Oklahoma was made, without an evidentiary hearing, on the pleadings and matters of which it could take judicial notice. No party contends seriously that any evidence is needed or helpful.

The Cherokees sued Oklahoma and the holders of various sand, gravel, oil, and gas leases granted by Oklahoma and covering parts of the land in dispute. The relief sought was an accounting and an injunction. Oklahoma and various of its lessees counterclaimed for a decree quieting title in Oklahoma. The Choctaws and Chickasaws were permitted to intervene and assert their claims of ownership to a portion of the riverbed.[2]

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[1] Sometimes known as the Neosho River and as the Neosho-Grand River.

[2] This is a joint claim. It is undisputed that the Choctaws have an undivided three-fourths interest and the Chickasaws an undivided one-fourth interest. See 11 Stat. 573; 11 Stat. 611; and Chickasaw Nation v. United States, 94 Ct.Cl. 215, 237. Hereinafter reference will be made only to the Choctaws.

All parties agree that the stretch of the Arkansas River with which we are concerned is navigable in fact.[3] From the mouth of the Grand to the confluence with the Canadian, the Arkansas flows through an area granted to the Cherokees. From the mouth of the Canadian to the state boundary, the river divides the lands of the Cherokees, which lie to the north, from the lands of the Choctaws, which lie to the south. The Choctaws claim that their title goes to the north bank of the Arkansas and the Cherokees dispute this. We find it unnecessary to consider this controversy between the Tribes.

The Tribes assert ownership by reason of deeds from the United States covering vast, undivided areas, the perimeters of which were described by metes and bounds. The deeds did not except the beds of navigable streams. The basic argument is that, as a simple matter of conveyancing law, title to all lands within the area vested in the Tribes. An understanding of the situation requires consideration of the circumstances in which the deeds were issued.

At the time of the independence of the United States, the Tribes occupied large areas of land in the South. Westward expansion caused increasing friction between the white settlers and the Indians. Georgia and other later formed states asserted jurisdiction over the Indians and their lands. Intolerable situations arose.[4] The states ignored efforts by the United States to protect and provide for the Indians through treaty and statute. The federal government, faced with growing strife among the

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[3] In Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 86, the Supreme Court upheld a lower court finding that the head of navigation on the Arkansas was the mouth of the Grand.

[4] Descriptions of the condition of the Indians are found in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1; Worcester v. Georgia, 31 U.S. (6 Pet.) 515; and Choctaw Nation v. United States, 119 U.S. 1.

Indians and the states, adopted the policy of resettling the Indians on lands to the west which were not then settled by whites.

The Cherokees were first given lands near the White River in what is now the State of Arkansas.[5] Emigration was slow, and new treaties were made, providing for resettlement of all the Cherokees on land west of the Mississippi to be deeded to the Indians by the United States. In turn, the Indians surrendered their lands east of the Mississippi.[6] The Cherokees were then moved to the new lands, but the voluntariness of their migration, and of their consent to the treaties, is doubtful.

The story of the Choctaws in much the same. Relocation of that Tribe from areas east of the Mississippi was made pursuant to the Treaty of Doak's Stand, October 18, 1820, 7 Stat. 210, and the Treaty of Dancing Rabbit Creek, September 27, 1830, 7 Stat. 333. The Choctaws gave up their lands in the East and received lands in the West.

The relocation of the Indians was made possible by the Louisiana Purchase of 1803,[7] in which the United States obtained the major portion of the western basin of the Mississippi River with the express intent that the inhabitants of the region "shall be incorporated in the Union of the United States."[8] Prior to relocation, however, the Cherokees and Choctaws desired protection from harassment by state and territorial governments. To induce them to move across the Mississippi, the United States

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[5] See Treaty of July 8, 1817, 7 Stat. 156, 158.

[6] See Treaty of May 6, 1828, 7 Stat. 311; Treaty of February 14, 1833, 7 Stat. 414; and Treaty of New Echota, December 29, 1835, 7 Stat. 478.

[7] Treaty of April 30, 1803, 8 Stat. 200.

[8] Id. at 202.

agreed in the Treaty of New Echota and in the Treaty of Dancing Rabbit Creek that no part of the land granted would be included in any state or territory.[9] The patents issued to the Cherokees and to the Choctaws contained no exception or reservation relating to the beds of navigable streams. The lands granted were described by their exterior boundaries.

In the years that followed the situation of the Indians deteriorated.[10] New territories were created in the West and new states admitted into the Union. A number of these states were in regions where Indian treaties provided that no state or territory should be created.[11] The existence of an extensive area which was held by the Indians and in which private property was not recognized was a serious obstacle to the creation of the State of Oklahoma.[12] In 1893, Congress created a commission to negotiate with the Cherokees, the Choctaws, and other tribes for the extinguishment of the tribal titles to land,[13]

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[9] The Treaty of New Echota provided (Art. 5, 7 Stat. 478, 481) that the lands ceded "shall, in no future time without their [the Indians'] consent, be included within the territorial limits or jurisdiction of any State or Territory." The Treaty of Dancing Rabbit Creek provided (Art. IV, 7 Stat. 333, 334) that "no part of the land granted them [the Indians] shall ever be embraced in any Territory or State."

[10] Stephens v. Cherokee Nation, 174 U.S. 445, 450-460, contains an account of conditions existing in the tribal governments and mentions their corruption and irresponsibility.

[11] See e.g. Treaty with the Senecas and Shawnees of July 20, 1831, 7 Stat. 351, 353; Treaty with the Shawnee of August 8, 1831, 7 Stat. 355, 357; and Treaty with the Ottaway of August 30, 1831, 7 Stat. 359, 361.

[12] Choate v. Trapp, 224 U.S. 665, 667.

[13] 27 Stat. 612, 645.

and the allotment of land to th individual members of the tribes. The result was an agreement with the Cherokees[14] and with the Choctaws[15] which nullified treaties inconsistent therewith and which provided for the allotment of the lands. These agreements were followed by the Act of April 26, 1906, 34 Stat. 37, which provided for final disposition of the affairs of the Five Civilized Tribes.[16] This Act required that lands belonging to the tribes on their dissolution shall be held by the United States in trust for the use and benefit of the Indians.[17]

Oklahoma was admitted into the Union in 1907 upon compliance with the conditions of the Enabling Act[18] which provided that Oklahoma should be so admitted "on an equal footing with the original States,"[19] and on the agreement that it disclaim title to all lands * * * owned or held by any Indian or Indian tribes."[20] By Statute[21] and by court decision[22] Oklahoma has consistently maintained the position that it owns the beds underlying

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[14] 32 Stat. 716, 727.

[15] 32 Stat. 641, 656.

[16] These included the Chickasaws, Creeks, and Seminoles in addition to the Cherokees and the Choctaws.

[17] 34 Stat. at 148.

[18] Act of June 16, 1906, 34 Stat. 267.

[19] Id. at 271.

[20] Id. at 279.

[21] See 64 Okl. St. Ann. § 290; 60 Okl. St. Ann. § 337.

[22] State v. Nolegs, 40 Okl. 479, 139 Pac. 943; Vickery v. Yahola Sand & Gravel Co., 158 Okl. 120, 12 P.2d 881; City of Tulsa v. Commissioners of Land Office, 187 Okl. 82, 101 P.2d 246; and Lynch v. Clements, (Okl.) 263 P.2d 1.

navigable streams. The present suit which questions that ownership was brought by the Cherokees nearly sixty years after statehood.

In Pollard v. Hagan, 44 U.S. (3 How.) 212, 230, the Court held that the Constitution did not pass title of the beds of navigable waters to the United States, but reserved title to the several states. Because new states enter the Union on an equal footing with all other states, title to the beds underlying navigable waters passes to the new states.[23] Shively v. Bowlby, 152 U.S. 1, 48, establishes the power of Congress to grant land below navigable water in a territory when it is necessary "to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce * * *, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." The decision in United States v. Holt State Bank, 270 U.S. 49, 55, recognizes the rule stated in Shively v. Bowlby and adds that the United States has refrained from making such dispositions except "in exceptional circumstances" and that disposals during the territorial period "are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain."

The parties recognize the principles just stated except that the Indians and those who support them question the applicability of the Holt State Bank decision because of distinguishing facts. Before Minnesota became a state in 1858, the Chippewas ceded to the United States their aborginal right of occupancy with the reservation of an area for continued occupation. Included therein was Mud Lake which the Court found to be navigable water. Later the Indians relinquished the area to the United States. The

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[23] See Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 436, and Weber v. Board of Harbor Commissioners, 85 U.S. (18 Wall.) 57, 65.

issue was whether the United States held title to the land on which Mud Lake was located. The Court held that the lands under the lake were not disposed of by the United States before Minnesota became a state and title passed to Minnesota on admission. Although Holt State Bank was not concerned with a situation, such as we have here, involving a conveyance by the United States to the Indians, that case and the one at bar each relate to the question of whether the United States had disposed of lands underlying navigable waters before statehood. We must follow the admonition in Holt State Bank that such dispositions should not be regarded as intended in the absence of a clear showing of intent.

The United States, as amicus,[24] argues that the equal footing-implied trust doctrine has no application because of the unique character of the Cherokee and Choctaw territory under the treaties and cites Atlantic and Pacific Railroad Company v. Mingus, 165 U.S. 413, as supporting authority. In that case the issue was the validity of an act forfeiting a part of a railroad land grant. A claim of the railroad was that the foreiture failed because the United States had not carried out its part of the bargain to extinguish certain Indian titles. The Court mentioned the Treaties of New Echota and Dancing Rabbit Creek and said that the extinguishment of the Indian title was for determination by Congress or by the executive officers of the federal government, or by voluntary acts of the Indians. Id. at 437-438. The Court quoted with approval the statement in Mackey v. Coxe, 59 U.S. (18 How.) 100, 103, that the Cherokee territory "is not a foreign, but a domestic territory–a Territory which originated under our Constitution and laws."

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[24] The United States disclaims any pecuniary interest in the outcome of the cases and says that it submits its views because of "its nonpecuniary obligations to represent certain Indian interests."

The treaties with the Indians are not in the same category with treaties with independent foreign nations. The Supreme Court early held that that English possessions in America were claimed by right of discovery rather than by right of conquest and that under international law the Indians were regarded as temporary occupiers of the soil which was disposable by the Crown.[25] The title of the Crown passed to the United States and the Indian lands were subject to disposition under the Constitution and laws of the United States. The agreements with the Indians, when ratified by Congress, became statutes of the United States. When grants were made to the Indians, the area granted remained under the jurisdiction of the United States and subject to its Constitution and laws.

In spite of provisions in Indian agreements that no state or territory would be created in certain areas,[26] states were created in the Northwest Territory and in the area covered by the Louisiana Purchase. In the situations before us, the Cherokees and Choctaws agreed to a nullification of the Treaties of New Echota and Dancing Rabbit Creek.[27] Oklahoma was admitted to the Union on an equal footing with the original states. From a practical standpoint, the equal footing principle must be recognized and maintained. There is no place in our federal system for a second-class state.

Title to the riverbed in question passed to Oklahoma on admission unless prior thereto Congress disposed of the federal title for a public purpose by an action showing a clear intent to make such divestiture. Such intent is not definitely declared in the grant. The question is whether

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[25] See Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 595, and Martin v. Waddell, 41 U.S. (16 Pet.) 367, 409.

[26] See footnote 11.

[27] See footnotes 14 and 15.

the surrounding circumstances make that intent "very plain."[28]

The intent is said to be established by the agreement of the United States that no state or territory would be created in the area granted. The acceptance of this position would have widespread implications because, as we have seen, other states were created in areas covered by Indian treaties having similar provisions to those found in the Treaties of New Echota and Dancing Rabbit Creek. We believe that such provisions had to do with the exercise of political power rather than with property rights. The political aspects were changed by the Indians' acceptance of the nullification of the treaties. The property rights were unaffected by either the recognition or the nullification of the treaty provisions concerned with the creation of state or territorial governments.

The Indians point out that the ownership of the riverbed is not necessary to the exercise of control over navigation incidental to the authority of the Government under the Commerce Clause. This proves nothing. We are concerned with a property right—not with a navigational right. The recognition in the treaties of the constitutional powers of the United States,[29] if it has any effect at all, negatives intent to convey the riverbed.

Pursuant to their agreements with the United States, the Indians surrendered the areas which they occupied in the South. They reason that because they gave up the beds of navigable rivers, the United States intended that they should have such riverbeds in the areas to which they were removed; and conversely they say that if they do not own the Oklahoma riverbeds, they still own the beds of the navigable rivers in the territory from which they were

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[28] United States v. Holt State Bank, 270 U.S. 49, 55.

[29] See Treaty of New Echota, Art. 5, 7 Stat. 478, 481, and Treaty of Dancing Rabbit Creek, Art. IV, 7 Stat. 333, 334.

removed. The reasoning is unpersuasive. The Indians had an aboriginal title which was subject to the Constitution and laws of the United States. Failure to mention riverbeds does not establish an intent either to retain or relinquish title. If anything, it shows that no party had the problem in mind.

Amici Carter, et al., argue that no contemporary intent of Congress to reserve the riverbeds can be postulated because under the then existing law the concept of navigability was limited to waters affected by the rise and fall of the tides and the Arkansas was not so affected. The Supreme Court has rejected as inapplicable to this country, the English rule that the test for navigability is the ebb and flow of the tides.[30] The recognition in 1832 by Kent of the English rule[31] preceded any decision by the Supreme Court on the issue and may not be taken as authoritative or persuasive. Reliance on the January 19, 1816, act of the Missouri Territorial Legislature[32] is misplaced because it adopted the common law of England except to the extent that it was not of a "local nature" and "not repugnant to, nor inconsistent with the constitution and laws of the United States." The Supreme Court has said that the ebb and flow of the tide test is not applicable to conditions in the United States. Jones v. Soulard, 65 U.S. (24 How.) 41, deals with the ownership of accretions and is not in point.

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[30] The Daniel Ball, 77 U.S. (10 Wall.) 557, 563, and Barney v. Keokuk, 94 U.S. 324, 336. The reason is that in England all navigable rivers are affected by the tide whereas in the United States that condition is not present.

[31] See Commentaries on American Law by James Kent, 2d ed., Vol. III, p. 427.

[32] The pertinent area was then in the Territory of Missouri.

The application of the navigability principle announced in The Daniel Ball and in Barney v. Keokuk, supra, to the situation presented does not violate any rule of stare decisis. We recognize the importance of stare decisis to decisions affecting property rights.[33] There is no showing that any federal court has ever applied the tidewater rule in determining the ownership of land underlying navigable water and, particularly, there is no factual basis for any claim that the Cherokees or Choctaws ever relied on that rule to their detriment.[34]

United States v. Rands, 389 U.S. 121, is no help to the Indians. That decision recognized the dominant navigational servitude held by the United States and rejected the claim that the United States must pay compensation for land's special value as a port site. It was not concerned with the ownership of a riverbed. It does not overrule Mumford v. Wardell, 73 U.S. (6 Wall.) 423, 436, which says that the soils underlying navigable water "were not granted by the Constitution to the United States, but were reserved to the several States."[35] We find nothing in

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[33] In this regard the amici Carter, et al., rely heavily on the statements in The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 458, that in overruling The Steam-Boat Thomas Jefferson, 23 U.S. (10 Wheat.) 428, it was not concerned with property rights. These cases dealt with admiralty jurisdiction and have no pertinence here.

[34] In Shively v. Bowlby, supra, the Court applied the American rule in deciding the ownership of the Columbia River upon Oregon's entrance to the Union in 1859. In the Holt State Bank case, supra, the Court applied the same rule to the ownership of Mud Lake when Minnesota became a state in 1858.

[35] In United States v. Holt State Bank, 270 U.S. 49, 55, the Court said that "the United States early adopted and constantly has adhered to" the implied trust doctrine regarding lands under navigable waters.

the law as it was at the times of the treaties which can be taken as indicative of an intent by the United States to pass title to the riverbed of the Arkansas to the Indians.

The Indians seek comfort from the technical language of the treaties and grants. They attach significance to such phrases as "to the Arkansas River," "down the Arkansas," and "thence down the main channel of the Arkansas." We agree with Oklahoma that references to the Arkansas River are for the purpose of establishing reference points, monuments, or boundaries. They do not indicate an intent, much less a clear intent, to convey the riverbed. Reliance on the surveys is misplaced. The surveyors could not determine the intent of the United States. Donnelly v. United States, 228 U.S. 243, is not in point. Prior to the creation of the reservation there in question, California, by an act of its legislature, had excluded the Klamath River from the navigable class and the Court said that accordingly the river was not navigable in law. Id. at 262-263.

In Moore v. United States, 9 Cir., 157 F.2d 760, cert. denied 330 U.S. 827, and in United States v. Stotts, W.D.Wash., 49 F.2d 619, it was held that lands above low-water mark in tidal areas passed to Indians under treaties with the United States. In each case the court found a definite intent on the part of the United States to retain those lands and waters for the benefit of Indian fisheries and distinguished Holt State Bank, supra, on this ground. In the case before us we have no showing of any need by the Indians for the riverbed of the Arkansas and no expression of intent that it should pass to the Indians.

We recognize that an Indian treaty is to be liberally construed in favor of the Indians[36] as unlettered people

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[36] United States v. Shoshone Tribe of Indians, 304 U.S. 111, 116.

understood it and as justice and reason demand when the strong assert power over those to whom they owe care and protection.[37] Another rule of construction is that in a grant by the sovereign nothing passes by implication.[38] Holt State Bank extends this rule to a situation relating to Indian lands and to the equal footing-implied trust doctrine. Although Holt State Bank did not deal with a claim presented by Indians and although the United States is not a party to this case, we believe that the rule announced in that decision must apply. It requires a clear and definite intent to convey the beds of navigable rivers which otherwise would pass to a state on admission. Such an intent is not shown by the grant of millions of acres of land which are described by perimeters. The responsibility of the United States to the new states is not less than its responsibility to the Indians.

In the final analysis the claim of the Indians rests on inference and implication. Nothing in the treaties, statutes, and conveyances establishes an intent by the United States, as trustee for states to be formed, to convey away property held for the benefit of the new states. When Congress passed the statutes pursuant to the Treaties of New Echota and Dancing Rabbit Creek, the lands covered were undeveloped and virtually unknown. To say that Congress then intended to convey the riverbeds, which over a hundred years later would become valuable because of underlying mineral deposits, is to ignore realities.

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[37] Menominee Tribe of Indians v. United States, 391 U.S. 404, 406. The Treaty of Dancing Rabbit Creek provides, Art. XVIII, 7 Stat. 333, 336, that "in the construction of this Treaty wherever well founded doubt shall arise, it shall be construed most favorably towards the Choctaws."

[38] Northern Pacific Ry. Co. v. Soderberg, 188 U.S. 526, 534, and Caldwell v. United States, 250 U.S. 14, 20.

In view of the disposition which we make of the case it is unnecessary to consider the jurisdiction of the court over the claim of the Choctaws against the Cherokees or the validity of that claim.

Affirmed.

Appendix B

Excerpts

TREATY WITH THE WESTERN CHEROKEE MAY 6, 1828
(7 Stat. 311, Vol. II, Kappler, 288)
Proclaimed May 28, 1828

Articles of a Convention, concluded at the City of Washington this sixth day of May, in the year of our Lord one thousand eight hundred and twenty-eight, between James Barbour, Secretary of War, being especially authorized therefor by the President of the United States, and the undersigned, Chiefs and Head Men of the Cherokee Nation of Indians, West of the Mississippi, they being duly authorized and empowered by their Nation.

Whereas, it being the anxious desire of the Government of the United States to secure to the Cherokee nation of Indians, as well as those now living within the limits of the Territory of Arkansas, as those of their friends and brothers who reside in States East of the Mississippi, and who may wish to join their brothers of the West, *a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, or any of the limits of any existing Territory or State; and, Whereas, the present location of the Cherokees in Arkansas being unfavorable to their present repose, and tending, as the past demonstrates, to their future degradation and misery; and the Cherokees being anxious to avoid such consequences, and yet not questioning their right to their lands in Arkansas, as secured to them by Treaty, and resting also upon the pledges given them by the President of the United States, and the Secretary of War, of March, 1818, and 8th October, 1821, in regard to the outlet to the West, and as may be seen on referring to the records

of the War Department, still being anxious to secure a permanent home, and to free themselves, and their posterity, from an embarrassing connexion with the Territory of Arkansas, and guard themselves from such connexion in future; and, Whereas, it being important not to the Cherokees only, but also to the Choctaws, and in regard also to the question which may be agitated in the future respecting the location of the latter, as well as the former, within the limits of the Territory or State of Arkansas, as the case may be, and their removal therefrom; and to avoid the cost which may attend negotiations to rid the Territory or State of Arkansas whenever it may become a State, of either, or both of those Tribes, the parties hereto do hereby conclude the following Articles, viz:

ARTICLE 1. The Western boundary of Arkansas shall be, and the same is, hereby defined, viz: A line shall be run, commencing on Red River, at the point where the Eastern Choctaw line strikes said River, and run due North with same line to the River Arkansas, thence in a direct line to the South West corner of Missouri.

ARTICLE 2. The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land, to be bounded as follows, viz: Commencing at that point on Arkansas River where the Eastern Choctaw boundary line strikes said River, and running thence with the Western line of Arkansas, as defined in the foregoing article, to the South-West corner of Missouri, and thence with the Western boundary line of Missouri till it crosses the waters of Neosho, generally called Grand River, thence due West to a point from which a due South course will strike the present North-West corner of Arkansas Territory, thence continuing due South, on and with the present boundary line of the Territory to the main branch of Arkansas River, and thence down said River to its junction with the Canadian

River, and thence up and between the said Rivers Arkansas and Canadian, to a point at which a line running North and South from River to River, will give the aforesaid seven millions of acres. In addition to the seven millions of acres thus provided for, and bounded, the United States further guarantee to Cherokee Nation a perpetual outlet, West, and a free and unmolested use of all the Country lying West of the Western boundary of the above described limits, and as far west as the sovereignty of the United States, and their right of soil extend.

ARTICLE 3. The United States agree to have the lines of the above cession run without delay, say not later than the first of October next, and to remove, immediately after the running of the Eastern line from the Arkansas River to the South-West corner of Missouri, all white persons from the West to the East of said line, and also all others, should there be any there, who may be unacceptable to the Cherokees, so that no obstacles arising out of the presence of a white population, or a population of any sort, shall exist to annoy the Cherokees—and also to keep all such from the West of said line in future.

* * *

ARTICLE 8. The Cherokee Nation, West of the Mississippi having, by this agreement, freed themselves from the harassing and ruinous effects consequent upon a location amidst a white population, and secured to themselves and their posterity, under the solemn sanction of the guarantee of the United States, as contained in this agreement, a large extend of unembarrassed country; and that their Brothers yet remaining in the States may be induced to join them and enjoy the repose and blessing of such a State in the future, it is further agreed, on the part of the United States, that to each Head of a Cherokee family now residing within the chartered limits of Georgia, or of either of the States, East of the Mississippi, who may desire to remove West, shall be given * * *.

ARTICLE 9. It is understood and agreed by the parties to this Convention, that a Tract of Land, two miles wide and six miles long, shall be, and the same is hereby, reserved for the use and benefit of the United States, for the accommodation of the military force which is now, or which may hereafter be, stationed at Fort Gibson, on the Neosho, or Grand River, to commence on said River half a mile below the aforesaid Fort, and to run thence due East two miles, thence Northwardly six miles, to a point which shall be two miles distant from the River aforesaid, thence due West to the said River, and down it to the place of beginning. And the Cherokees agree that the United States shall have and possess the right of establishing a road through their country for the purpose of having a free and unmolested way to and from said Fort.

* * *

ARTICLE 11. This Treaty to be binding on the contracting parties so soon as it is ratified by the President of the United States, by and with the advice and consent of the Senate.

Done at the place, and on the day and year above written.

James Barbour	(L.S.)
Black Fox, his x mark,	(L.S.)
Thomas Graves, his x mark,	(L.S.)
George Guess,[a]	(L.S.)
Thomas Maw,[a]	(L.S.)
George Marvis,[a]	(L.S.)
John Looney,[a]	(L.S.)
John Rogers,	(L.S.)
J. W. Flawey, counsellor of Del.	(L.S.)

Chiefs of the delegation

[a] Written by the signers in their language, and in the characters now in use among them, as discovered by George Guess.

Witnesses:

Thos. L. McKenney
James Rogers, interpreter,
D. Kurtz,
H. Miller,
Thomas Murray,
D. Brown, secretary Cherokee delegation,
Pierye Pierya,
E. W. Duval, United States agent, etc.

Ratified with the following proviso:

"Provided, nevertheless, that the said convention shall not be so construed as to extend the northern boundary of the 'perpetual outlet west,' provided for and guaranteed in the second article of said convention, north of the thirty-sixth degree of north latitude or so as to interfere with the lands assigned, or to be assigned, west of the Mississippi river, to the Creek Indians who have emigrated, or may emigrate, from the States of Georgia and Alabama, under the provisions of any treaty or treaties heretofore concluded between the United States and the Creek tribe of Indians; and provided further, That nothing in the said convention shall be construed to cede or assign to the Cherokees any lands heretofore ceded or assigned to any tribe or tribes of Indians, by any treaty now existing and in force, with any such tribe or tribes."

DEPARTMENT OF WAR,
31st May, 1828.

TO THE HON. HENRY CLAY,
Secretary of State:

SIR: I have the honor to transmit, herewith, the acceptance of the terms, by the Cherokees, upon which the recent convention with them was ratified. You will have the goodness to cause the same to be attached to the treaty, and published with it.

I have the honor to be, very respectfully, your obedient servant,

SAM'L. L. SOUTHARD.

COUNCIL ROOM, WILLIAMSON'S HOTEL,
Washington, May 31st, 1828.

TO THE SECRETARY OF WAR,
Washington City:

SIR: The undersigned, chiefs of the Cherokee nation, west of the Mississippi, for and in behalf of said nation, hereby agree to, and accept of, the terms upon which the Senate of the United States ratified the convention, concluded at Washington on the sixth day of May, 1828, between the United States and said nation.

In testimony whereof, they hereunto, subscribe their names and affix their seals.

Thomas Graves, his x mark,	(L.S.)
George Maw, his x mark,	(L.S.)
George Guess, his x mark,	(L.S.)
Thomas Marvis, his x mark,	(L.S.)
John Rogers,	(L.S.)

Signed and sealed in the presence of—

E. W. Duval, United States agent, etc.
Thomas Murray,
James Rogers, interpreter.

Appendix C

Excerpts

TREATY WITH THE WESTERN CHEROKEE
FEBRUARY 14, 1833
(7 Stat. 414, Vol. II, Kappler, 385)
Proclaimed April 12, 1834

Articles of agreement and convention made and concluded at Fort Gibson, on the Arkansas river on the fourteenth day of Febraury one thousand eight hundred and thirty-three, by and between Montfort Stokes, Henry L. Ellsworth and John F. Schermerhorn duly appointed Commissioners on the part of the United States and the undersigned Chiefs and Head-men of the Cherokee nation of Indians west of the Mississippi, they being duly authorized and empowered by their nation.

Whereas articles of convention were concluded at the city of Washington, on the sixth day of May one thousand eight hundred and twenty-eight, between James Barbour Secretary of War, being specially authorized therefor by the President of the United States, and the chiefs and head-men of the Cherokee nation of Indians west of the Mississippi, which articles of convention were duly ratified. And whereas it was agreed by the second article of said convention as follows "That the United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is solemnly pledged, of seven millions of acres of land, said land to be bounded as follows; viz, commencing at a point on Arkansas river, where the eastern Choctaw boundary line strikes said river, and running thence with the western line of Arkansas Territory to the southwest corner of Missouri, and thence with the western boundary line of Missouri till it crosses the waters of Neosho, generally called Grand River, thence due west, to a point from which a due south course will strike the present northwest corner of Arkansas Territory, thence continuing due south on and with the present

boundary line on the west of said Territory, to the main branch of Arkansas river, thence down said river to its junction with the Canadian, and thence up, and between said rivers Arkansas and Canadian to a point at which a line, running north and south, from river to river, will give the aforesaid seven millions of acres, thus provided for and bounded. The United States further guarantee to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above-described limits; and as far west, as the sovereignty of the United States and their right of soil extend. And whereas there was to said articles of convention and agreement, the following proviso viz. "Provided nevertheless, that said convention, shall not be so construed, as to extend the northern boundary of said perpetual outlet west, provided for and guaranteed in the second article of said convention, north of the thirty-sixth degree of north latitude, or so as to interfere with the lands assigned, or to be assigned, west of the Mississippi river, to the Creek Indians who have emigrated, or may emigrate, from the States of Georgia and Alabama, under the provisions of any treaty, or treaties, heretofore concluded, between the United States and the Creek tribe of Indians—and provided further, that nothing in said convention, shall be construed, to cede, or assign, to the Cherokees any lands heretofore ceded, or assigned, to any tribe, or tribes of Indians, by any treaty now existing and in force, with any such tribe or tribes." —And whereas, it appears from the Creek treaty, made with the United States, by the Creek nation, dated twenty-fourth day of January eighteen hundred and twenty-six, at the city of Washington; that they had the right to select, and did select, a part of the country described within the boundaries mentioned above in said Cherokee articles of agreement—and whereas, both the Cherokee and Creek nations of Indians west of the Mississippi, anxious to have their boundaries settled in an

amicable manner, have met each other in council, and, after full deliberation mutually agreed upon the boundary lines between them—Now, therefore, the United States on one part, and the chiefs and head-men of the Cherokee nation of Indians west of the Mississippi on the other part agree as follows:

ARTICLE I. The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee, is hereby pledged, of seven millions of acres of land, to be bounded as follows viz: Beginning at a point on the old western territorial line of Arkansas Territory, being twenty-five miles north from the point, where the Territorial line crosses Arkansas river—thence running from said north point, south, on the said Territorial line to the place where said Territorial line crosses the Verdigris river—thence down said Verdigris river, to the Arkansas, thence down said Arkansas to a point, where a stone is placed opposite to the east or lower bank of Grand river at its junction with the Arkansas—thence running south, forty-four degrees west, one mile—thence in a straight line to a point four miles northerly from the mouth of the north fork of the Canadian—thence along the said four miles lines to the Canadian—thence down the Canadian to the Arkansas—thence, down the Arkansas, to that point on the Arkansas, where the eastern Choctaw boundary strikes, said river; and running thence with the western line of Arkansas Territory as now defined, to the south-west corner of Missouri—thence along the western Missouri line, to the land assigned the Senecas; thence, on the south line of the Senecas to Grand river; thence, up said Grand river, as far as the south line of the Osage reservation, extended if necessary—thence up and between said south Osage line, extended west if necessary and a line drawn due west, from the point of beginning, to a certain distance west, at which, a line running north and south, from said Osage line, to said due west line, will make seven millions of acres within the whole described

boundaries. In addition to the seven millions of acres of land, thus provided for, and bounded, the United States, further guarantee to the Cherokee nation, a perpetual outlet west and a free and unmolested use of all the country lying west, of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extended–Provided however, that if the saline, or salt plain, on the great western prairie, shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men, to get salt on said plain in common with the Cherokees–and letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed.

ARTICLE II. The Cherokee nation hereby relinquishes and quit claim to the United States all the right interest and title which the Cherokees have, or claim to have and to all the land ceded, or claimed to have been ceded to said Cherokee nation by said treaty of sixth of May one thousand eight hundred and twenty-eight, and not embraced within the limits or boundaries fixed in this present supplementary treaty or articles of convention and agreement.

ARTICLE III. The Cherokee nation, having particularly requested the United States to annul and cancel the sixth article of said treaty of sixth May, one thousand eight hundred and twenty-eight, the United States, agree to cancel the same, and the same is hereby annulled–Said sixth article referred to, is in the following words–"It is moreover agreed by the United States, when the Cherokees may desire it, to give them a plain set of laws, suited to their condition–also when they may wish to lay off their lands and own them individually, a surveyor shall be sent to survey them at the expense of the United States.

* * *

ARTICLE V. These articles of agreement and convention are to be considered supplementary, to the treaty before mentioned between the United States, and the Cherokee nation west of the Mississippi dated sixth of May one thousand eight hundred and twenty-eight, and not to vary the rights of the parties to said treaty, any further, than said treaty is inconsistent with the provisions of this treaty, now concluded, or these articles of convention or agreement.

ARTICLE VI. It is further agreed by the Cherokee nation, that one mile square shall be reserved and set apart from the lands hereby guaranteed, for the accommodation of the Cherokee agency; and the location of the same shall be designated by the Cherokee nation, in conjunction with the agent of the Government of the United States.

ARTICLE VII. This treaty, or articles of convention, after the same have been ratified, by the President and Senate shall be obligatory on the United States and said Cherokee nation.

In testimony whereof, the said Montfort Stokes, Henry L. Ellsworth, and John F. Schermerhorn, commissioners as aforesaid and the chiefs and head men of the Cherokee nation aforesaid, have hereunto set their hands, at Fort Gibson on the Arkansas river, on the 14th day of February, one thousand eight hundred and thirty-three.

Montfort Stokes,
Henry L. Ellsworth,
J. F. Schermerhorn,
John Jolly, his x mark,
Black Coat, his x mark,

Walter Webber,
Principal Chiefs:
John Rogers, president commissioners,
Glass, president council.

SIGNED, sealed, and delivered in our presence:

S. C. Stambaugh, secretary commissioners,
M. Arbuckle, colonel Seventh Infantry,
Geo. Vashon, agent Cherokees west,
Jno. Campbell, agent Creeks.
Alexander Brown, his x mark,
Jno. Hambly,
Interpreters,

William Nesbitt,
Peter A. Cams,
N. Young, major U.S. Army
W. Seawell, lieutenant Seventh Infantry,
Wm. Thomton, clerk committee
Charles Webber, clerk council.

Appendix D

Excerpts

TREATY WITH THE CHEROKEE, DECEMBER 29, 1835.
(7 Stat. 478, Vol. II, Kappler, 439)
Proclaimed May 23, 1836.

Articles of a treaty, concluded at New Echota in the State of Georgia on the 29th day of Decr. 1835 by General William Carroll and John F. Schermerhorn commissioners on the part of the United States and the Chiefs Head Men and People of the Cherokee tribe of Indians.

Whereas the Cherokees are anxious to make some arrangements with the Government of the United States whereby the difficulties they have experienced by a residence within the settled parts of the United States under the jurisdiction and laws of the State Government may be terminated and adjusted; and with a view to reuniting their people in one body and securing a permanent home for themselves and their posterity in the country selected by their forefathers without the territorial limits of the State sovereignties, and where they can establish and enjoy a government of their choice and perpetuate such a state of society as may be most consonant with their views, habits and condition; and as may tend to their individual comfort and their advancement in civilization.

And whereas a delegation of the Cherokee nation composed of Messrs. John Ross Richard Taylor Danl. McCoy Samuel Gunter and William Rogers with full power and authority to conclude a treaty with the United States did on the 28th day of February 1835 stipulate and agree with the Government of the United States to submit to the Senate to fix the amount which should be allowed the Cherokees for their claims and for a cession of their lands east of the Mississippi river, and did agree to abide by the award of the Senate of the United States themselves and

to recommend the same to their people for their final determination.

And whereas on such submission the Senate advised "that a sum not exceeding five millions of dollars be paid to Cherokee Indians for all their lands and possessions east of the Mississippi river."

And whereas this delegation after said award of the Senate had been made, were called upon to submit propositions as to its disposition to be arranged in a treaty which they refused to do, but insisted that the same "should be referred to their nation and there in general council to deliberate and determine on the subject in order to ensure harmony and good feeling among themselves."

And whereas a certain other delegation composed of John Ridge, Elias Boudinot, Archilla Smith, S. W. Bell, John West, Wm. A. Davis and Ezekiel West, who represented that portion of the nation in favor of emigration to the Cherokee country west of the Mississippi entered into propositions for a treaty with John F. Schermerhorn commissioner on the part of the United States which were to be submitted to their nation for their final action and determination:

And whereas the Cherokee people, at their last October council at Red Clay, fully authorized and empowered a delegation or committee of twenty persons of their nation to enter into and conclude a treaty with the United States commissioners then present, *at that place or elsewhere* and as the people had good reason to believe that a treaty would then and there be made or at a subsequent council at New Echota which the commissioners it was well known and understood, were authorized and instructed to convene for said purpose; and since the said delegation have gone on to Washington City, with a view to close negotiations there, as stated by them notwithstanding they

were officially informed by the United States commissioner that they would not be received by the President of the United States; and that the Government would transact no business of this nature with them, and that if a treaty was made it must be done here in the nation, where the delegation at Washington last winter *urged that it should be done for the purpose of promoting peace and harmony among the people;* and since these facts have also been corroborated to us by a communication recently received by the commissioner from the Government of the United States and read and explained to the people in open council and therefore believing said delegation can effect nothing and since our difficulties are daily increasing and our situation is rendered more and more precarious, uncertain, and insecure in consequence of the legislation of the States; and seeing no effectual way of relief, but in accepting the liberal overtures of the United States.

And whereas Genl William Carroll and John F. Schermerhorn were appointed commissioners on the part of the United States, with full power and authority to conclude a treaty with the Cherokees east and were directed by the President to convene the people of the nation in general council at New Echota and to submit said propositions to them with power and authority to vary the same so as to meet the views of the Cherokees in reference to its details.

And whereas the said commissioners did appoint and notify a general council of the nation to convene at New Echota on the 21st day of December 1835; and informed them that the commissioners would be prepared to make a treaty with the Cherokee people who should assemble there and those who did not come they should conclude gave their assent and sanction to whatever should be transacted at this council and the people having met in couniel [sic] according to said notice.

Therefore the following articles of a treaty are agreed upon and concluded between William Carroll and John F. Schermerhorn commissioners on the part of the United States and the chiefs and head men and people of the Cherokee nation in general council assembled this 29th day of Decr. 1835.

ARTICLE 1. The Cherokee nation hereby cede relinquish and convey to the United States all the lands owned claimed or possessed by them east of the Mississippi river, and hereby release all their claims upon the United States for spoliations of every kind for and in consideration of the sum of five millions of dollars to be expended paid and invested in the manner stipulated and agreed upon in the following articles, but as a question has arisen between the commissioners and the Cherokees whether the Senate in their resolution by which they advised "that a sum not exceeding five millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi river" have included and made any allowance or consideration for claims for spoliations it is therefore agreed on the part of the United States that this question shall be again submitted to the Senate for their consideration and decision and if no allowance was made for spoliations that then an additional sum of three hundred thousand dollars be allowed for the same.

ARTICLE 2. Whereas by the treaty of May 6th 1828 and the supplementary treaty thereto of Feb. 14th 1833 with the Cherokees west of the Mississippi the United States guarantied [sic] and secured to be conveyed by patent, to the Cherokee nation of Indians the following tract of country "Beginning at a point on the old western territorial line of Arkansas Territory being twenty-five miles north from the point where the territorial line crosses Arkansas river, thence running from said north point south on the said territorial line where the said

territorial line crosses Verdigris river; thence down said Verdigris river to the Arkansas river; thence down said Arkansas to a point where a stone is placed opposite the east or lower bank of Grand river at its junction with the Arkansas; thence running south forty-four degrees west one mile; thence in a straight line to a point four miles northerly, from the mouth of the north fork of the Canadian; thence along the said four mile line to the Canadian; thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas where the eastern Choctaw boundary strikes said river and running thence with the western line of Arkansas Territory as now defined, to the southwest corner of Missouri; thence along the western Missouri line to the land assigned the Senecas; thence on the south line of the Senecas to Grand river; thence up said Grand river as far as the south line of the Osage reservation, extended if necessary; thence up and between said south Osage line extended west if necessary, and a line drawn due west from the point of beginning to a certain distance west, at which a line running north and south from said Osage line to said due west line will make seven millions of acres within the whole described boundaries. In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend:

Provided however That if the saline or salt plain on the western prairie shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men to get salt on said plain in common with the Cherokees; And letters patent shall be issued by the United States as soon as practicable for the land hereby guarantied [sic]."

And whereas it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi the United States in consideration of the sum of five hundred thousand dollars therefore hereby convenant and agree to convey to the said Indians, and their descendants by patent, in fee simple the following additional tract of land situated between the west line of the State of Missouri and the Osage reservation beginning at the southeast corner of the same and runs north along the east line of the Osage lands fifty miles to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning; estimated to contain eight hundred thousand acres of land; but it is expressly understood that if any of the lands assigned the Quapaws shall fall within the aforesaid bounds the same shall be reserved and excepted out of the lands above granted and a prorata reduction shall be made in the price to be allowed to the United States for the same by the Cherokees.

ARTICLE 3. The United States also agrees that the lands above ceded by the treaty of Feb. 14, 1833, including the outlet, and those ceded by this treaty shall all be included in one patent executed to the Cherokee nation of Indians by the President of the United States according to the provisions of the act of May 28, 1830. It is, however, agreed that the military reservation at Fort Gibson shall be held by the United States. But should the United States abandon said post and have no further use for the same it shall revert to the Cherokee nation. The United States shall always have the right to make and establish such post and military roads and forts in any part of the Cherokee country, as they may deem proper for the interest and protection of the same and the free

use of as much land, timber, fuel and materials of all kinds for the construction and support of the same as may be necessary; provided that if the private rights of individuals are interfered with, a just compensation therefor shall be made.

* * *

ARTICLE 5. The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.

ARTICLE 6. Perpetual peace and friendship shall exist between the citizens of the United States and the Cherokee Indians. The United States agree to protect the Cherokee nation from domestic strife and foreign enemies and against intestine wars between the several tribes. The Cherokees shall endeavor to preserve and maintain the peace of the country and not make war upon their neighbors they shall also be protected against interruption and intrusion from citizens of the United States, who may attempt to settle in the country without their consent; and all such persons shall be removed from the same by

order of the President of the United States. But this is not intended to prevent the residence among them of useful farmers, mechanics, and teachers for the instruction of Indians according to treaty stipulations.

ARTICLE 7. The Cherokee nation having already made great progress in civilization and deeming it important that every proper and laudable inducement should be offered to their people to improve their condition as well as to guard and secure in the most effectual manner the rights guarantied [sic] to them in this treaty, and with a view to illustrate the liberal and enlarged policy of the Government of the United States towards the Indians in their removal beyond the territorial limits of the States, it is stipulated that they shall be entitled to a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same.

ARTICLE 8. The United States also agree and stipulate to remove the Cherokees to their new homes and to subsist them one year after their arrival there and that a sufficient number of steamboats and baggage-wagons shall be furnished to remove them comfortably, and so as not to endanger their health, and that a physician well supplied with medicines shall accompany each detachment of emigrants removed by the Government. Such persons and families as in the opinion of the emigrating agent are capable of subsisting and removing themselves shall be permitted to do so; and they shall be allowed in full for all claims for the same twenty dollars for each member of their family; and in lieu of their one year's rations they shall be paid the sum of thirty-three dollars and thirty-three cents if they prefer it.

Such Cherokees also as reside at present out of the nation and shall remove with them in two years west of the Mississippi shall be entitled to allowance for removal and subsistence as above provided.

* * *

ARTICLE 11. The Cherokee nation of Indians believing it will be for the interest of their people to have all their funds and annuities under their own direction and future disposition hereby agree to commute their permanent annuity of ten thousand dollars for the sum of two hundred and fourteen thousand dollars, the same to be invested by the President of the United States as a part of the general fund of the nation; and their present school fund amounting to about fifty thousand dollars shall constitute a part of the permanent school fund of the nation.

* * *

ARTICLE 19. This treaty after the same shall be ratified by the President and Senate of the United States shall be obligatory on the contracting parties.

ARTICLE 20. (Supplemental article. Stricken out by Senate.)

In testimony whereof, the commissioners and the chiefs, head men, and people whose names are hereunto annexed, being duly authorized by the people in general council assembled, have affixed their hands and seals for themselves, and in behalf of the Cherokee nation.

I have examined the foregoing treaty, and although not present when it was made, I approve its provisions generally, and therefore sign it.

William Carroll,
J. F. Schermerhorn.

Major Ridge, his x mark	(L.S.)	Te-gah-e-ske, his x mark	(L.S.)
James Foster, his x mark,	(L.S.)	Robert Rogers,	(L.S.)
Tesa-ta-esky, his x mark	(L.S.)	John Gunter,	(L.S.)
Charles Moore, his x mark,	(L.S.)	John A. Bell,	(L.S.)
George Chambers, his x mark,	(L.S.)	Charles F. Foreman,	(L.S.)
Tah-yeske, his x mark,	(L.S.)	William Rogers,	(L.S.)
Archilla Smith, his x mark,	(L.S.)	George W. Adair,	(L.S.)
Andrew Ross,	(L.S.)	Elias Boudinot,	(L.S.)
William Lassley,	(L.S.)	James Starr, his x mark	(L.S.)
Cae-te-hee, his x mark,	(L.S.)	Jesse Half-breed, his x mark,	(L.S.)

Signed and sealed in the presence of–

Western B. Thomas, secretary.
Ben F. Currey, special agent.
M. Wolfe Batman, first lieutenant, six U.S. Infantry, disbursing agent.
Jon L. Hooper, lieutenant, fourth Infantry.
C. M. Hitchcock, M.D. assistant surgeon U.S.A.
G. W. Currey,
William H. Underwood,
Comellius D. Terhune,
John W. H. Underwood.

In compliance with instruction of the council at New Echota, we sign this treaty.

Stand Watie,
John Ridge.

March 1, 1836
Witnesses:

Elbert Herring,
Alexander H. Everett,
John Robb,
D. Kurtz,
Wm. Y. Hansell,
Samuel J. Potts,
Jno. Litle,
S. Rockwell.

* * *

Appendix E

Excerpts

THE UNITED STATES OF AMERICA TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING

WHEREAS, by certain treaties made by the United States of America with the Cherokee Nation of Indians * * it was stipulated and agreed on the part of the United States, * * the United States should guaranty, secure, and convey by Patent, to the said Cherokee Nation, certain tracts of land: the description of which tracts and the terms and conditions on which they were to be conveyed, are * * in the words following, that is to say:–

"ARTICLE 2d WHEREAS, by the treaty of May sixth, one thousand eight hundred and twenty-eight, and the supplementary treaty thereto of February fourteenth, one thousand eight hundred and thirty-three, * * the United States guarantied and secured, to be conveyed by patent to the Cherokee nation of Indians, * * SEVEN MILLIONS OF ACRES within the whole described boundaries.

In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation A PERPETUAL OUTLET WEST, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend.

PROVIDED, HOWEVER, that if the SALINE or SALT PLAIN on the western prairie shall fall within said limits * * the right is reserved to the United States to permit other tribes of red men to get salt on said plain, in common with the Cherokees.

And LETTERS PATENT, shall be issued by the United States as soon as practicable for the land hereby guarantied.

AND WHEREAS, it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi, the United States, in consideration of the sum of FIVE HUNDRED THOUSAND DOLLARS, * * hereby covenant and agree to convey to the said Indians and their descendants, by Patent, in fee simple, the following additional tract of land situated between the west line of the State of Missouri and the Osage reservation, beginning at the south-east corner of the same, and runs north along the east line of the Osage lands fifty miles, to the north-east corner thereof; and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning; estimated to contain eight hundred thousand acres of land; * *

ARTICLE 3d. The United States also agree, that the lands above ceded by the treaty of February fouteenth, one thousand eight hundred and thirty-three, including the outlet, and those ceded by this treaty, shall all be included in one PATENT, executed to the Cherokee nation of Indians by the President of the United States, according to the provisions of the Act of May twenty-eighth, one thousand eight hundred and thirty. * *

The United States shall always have the right to make and establish such POST and MILITARY-ROADS and FORTS in any part of the Cherokee country as they may deem proper for the interest and protection of the same, and the free use of as much land, timber, fuel and materials of all kinds for the construction and support of the same, as may be necessary, Provided, that if the private rights of individuals are interfered with, a just compensation therefor shall me made."–

AND WHEREAS, the United States have caused the said tract of Seven Millions of Acres, together with the said perpetual outlet, to be surveyed in one tract, the boundaries whereof are as follows: beginning at a mound of rocks four feet square * * on what has been denominated the old western territorial line of Arkansas Territory twenty-five miles north of Arkansas river; thence south twenty-one miles and twenty eight chains, to a post on the north-east bank of the Verdigris river; * * thence down the Verdigris river, on the northeast bank, with its meanders to the junction of Verdigris and Arkansas rivers; thence from the lower bank of Verdigris river on the north Bank of Arkansas river south forty-four degrees, thirteen minutes, east, fifty seven chains, to a post on the south bank of Arkansas opposite the eastern bank of Neosho river at its junction with Arkansas, * * thence south fifty three degrees west, one mile, to a post * * thence south eighteen degrees, eighteen minutes west thirty three miles, twenty-eight chains and eighty links, to a rock * * thence south four miles, to a post, on the lower bank of the north fork of Canadian river, at its junction with Canadian river, * * * thence down the Canadian river on its north bank to its junction with Arkansas river; thence down the main channel of Arkansas river to the western boundary of the State of Arkansas at the northern extremity of the eastern boundary of the lands of the Choctaws on the south bank of Arkansas river, four chains and fifty four links east of Fort Smith; thence north seven degrees twenty five minutes west with the western boundary of the State of Arkansas, seventy-six miles sixty four chains and fifty links, to the south-west corner of the State of Missouri; thence north, on the western boundary of the State of Missouri eight miles, forty nine chains and fifty links, to the north bank of Cowskin, or Seneca river, at a mound six feet square at base and five feet high * * thence west on the southern boundary of the lands of the Senecas, eleven miles and

forty-eight chains, to a post on the east bank of Neosho river; * * thence up Neosho river, with its meanders on the east bank, to the southern boundary of the Osage lands, thirty six chains and fifty links west of the southeast corner of the lands of the Osages, witnessed by a mound of rocks on the west bank of the Neosho river; thence west on the southern boundary of the Osage lands to the line dividing the territory of the United States from that of Mexico two hundred and eighty eight miles, thirteen chains and sixty six links, to a mound of earth six feet square * * thence south along the line of the territory of the United States and of Mexico, sixty miles and twelve chains, to a mound of earth six feet square * * thence east along the northern boundary of Creek lands, two hundred and seventy-three miles, fifty-five chains and sixty six links, to the beginning, containing within the Survey thirteen millions, five hundred and seventy four thousand, one hundred and thirty five acres and fourteen hundredths of an acre.–

AND WHEREAS, the United States have also caused the said tract of Eight hundred thousand acres, to be surveyed, and have ascertained the boundaries thereof * *

THEREFORE, in execution of the agreements and stipulations contained in the said several treaties, the United States have GIVEN and GRANTED and by these presents do GIVE and GRANT, unto the said Cherokee nation, the two tracts of land so surveyed and herein before described, containing in the whole fourteen millions, three hundred and seventy four thousand, one hundred and thirty-five acres and fourteen-hundredths of an acre:

TO HAVE AND TO HOLD THE SAME, together with the rights privileges and appurtenances thereunto belonging, to the said CHEROKEE NATION FOREVER, subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plain

on the western prairie, referred to in the second acticle of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty five, which salt plains has been ascertained to be within the limits prescribed for the outlet agreed to be granted by the said article; and subject also to all the other rights reserved to the United States in and by the articles hereinbefore recited, to the extent and in the manner in which the said rights are reserved and subject also to the condition provided by the Act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above recited third article, and which condition is that the lands hereby granted shall revert to the United States if the said Cherokee Nation ceases and abandons the same.–

IN TESTIMONY WHEREOF, I, Martin Van Buren, PRESIDENT OF THE UNITED STATES OF AMERICA, have caused these letters to be made PATENT and the SEAL of the GENERAL LAND OFFICE to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the thirty-first day of December in the year of our Lord one thousand eight hundred and thirty eight, and of the Independence of the United States, the sixty third.

By the President M. VAN BUREN
M. M. GARLAND
Recorder of the General Land Office